

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL BRANNAN,

Plaintiff,

vs.

BANK OF AMERICA, *et al.*,

Defendants.

Case No.: 2:16-cv-01004-GMN-GWF

ORDER

Pending before the Court is the Motion for Summary Judgment, (ECF No. 57), filed by Defendant Bank of America, N.A. (“BANA”). Pro Se Plaintiff Michael Brannan (“Plaintiff”) failed to file a response.¹

Also pending before the Court is BANA’s Motion to Expunge Lis Pendens, (ECF No. 58). Plaintiff failed to file a response to this Motion as well. For the reasons discussed below, the Court **GRANTS** BANA’s Motion for Summary Judgment and Motion to Expunge Lis Pendens.

I. BACKGROUND

This case arises out of the non-judicial foreclosure on real property located at 2204 Night Parrot Avenue, North Las Vegas, Nevada (the “Property”). (First Am. Compl. (“FAC”) ¶ 7, ECF No. 42). In August of 2007, Plaintiff purchased the Property by way of a loan from Countrywide Bank, FSB in the amount of \$282,478.00 secured by a deed of trust (“DOT”). (*Id.* ¶ 8). On July 20, 2011, the DOT was assigned to BAC Home Loans Servicing, which subsequently merged with BANA. (*See* Mot. Summ. J. (“MSJ”) 2:10–12, ECF No. 57); (Ex. C-

¹ In light of Plaintiff’s status as a pro se litigant, the Court has liberally construed his filings, holding them to standards less stringent than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

1 1 to MSJ 30–31, ECF No. 57-1); (Ex. D-1 to MSJ 33–35, ECF No. 57-1).² BANA is the
2 current holder of the promissory note evidencing the loan and BANA is the beneficiary of the
3 DOT securing the loan. (MSJ 2:7–12); (*See* Note, Ex. A-1 to MSJ 6–7, ECF No. 57-1); (*See*
4 DOT, Ex. B-1 to MSJ 9–10, ECF No. 57-1).

5 In September 2013, a notice of default (the “2013 NOD”) was recorded against the
6 property. (MSJ 2:16–17). Pursuant to Nevada Revised Statutes section 107.086, Plaintiff
7 requested mediation under Nevada’s Foreclosure Mediation Program. (*Id.* 2:18–19). Following
8 the mediation on February 4, 2014, the mediator declined to issue a certificate of foreclosure
9 because BANA failed to produce required documents including the original or certified copies
10 of the note and the DOT. (FAC ¶¶ 20, 22); (MSJ 2:19–21). On March 16, 2016, BANA
11 recorded a second notice of default and election to sell (the “2016 NOD”). (MSJ 2:22–24).

12 In light of this, Plaintiff filed his initial complaint in state court on April 4, 2016, and
13 BANA subsequently filed a petition for removal. (*See* Ex. A to Pet. for Removal, ECF No. 1-
14 2); (*See also* Pet. for Removal, ECF No. 1). Plaintiff filed his FAC on December 6, 2016. (*See*
15 ECF No. 42). Plaintiff alleges that he paid the loan in full and that BANA moved forward with
16 the foreclosure despite being in violation of the mediation process. (*Id.* ¶¶ 25, 23). Plaintiff
17 brings claims for 1) specific performance; 2) temporary injunctive relief; 3) intentional
18 infliction of emotional distress; 4) declaratory relief; 5) quiet title; and 6) breach of the implied
19 covenant of good faith and fair dealing. (*See id.* ¶¶ 28–52).

20 **II. LEGAL STANDARD**

21 The Federal Rules of Civil Procedure provide for summary adjudication when the
22 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
23

24 ² BANA’s exhibits to its Motion for Summary Judgment are designated as exhibits to the Declaration of
25 Darsheen Littlejohn, which is identified as “Exhibit A.” For ease of presentation, the Court will cite to the
exhibits to the LittleJohn Declaration as if they were stand-alone exhibits. For example, the Court will refer to
Exhibits A and B to the Littlejohn Declaration as “Ex. A-1,” and “Ex. B-1,” respectively.

1 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
2 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
3 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
4 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
5 jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if
6 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
7 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
8 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
9 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
10 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

11 In determining summary judgment, a court applies a burden-shifting analysis. “When
12 the party moving for summary judgment would bear the burden of proof at trial, it must come
13 forward with evidence which would entitle it to a directed verdict if the evidence went
14 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
15 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
16 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
17 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
18 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
19 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
20 party failed to make a showing sufficient to establish an element essential to that party’s case
21 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
22 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
23 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,
24 398 U.S. 144, 159–60 (1970).

1 If the moving party satisfies its initial burden, the burden then shifts to the opposing
2 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
3 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
4 the opposing party need not establish a material issue of fact conclusively in its favor. It is
5 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
6 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
7 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
8 summary judgment by relying solely on conclusory allegations that are unsupported by factual
9 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
10 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
11 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

12 At summary judgment, a court’s function is not to weigh the evidence and determine the
13 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
14 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
15 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is
16 not significantly probative, summary judgment may be granted. *See id.* at 249–50.

17 **III. DISCUSSION**

18 In its Motion for Summary Judgment, BANA argues that the undisputed material facts
19 show that each of Plaintiff’s causes of action fail as a matter of law. (BANA’s Mot. Summ. J.
20 (“MSJ”) 3:16–23, ECF No. 57). Specifically, BANA asserts that it has produced competent
21 evidence proving that Plaintiff has defaulted on the loan. (*Id.* 3:18–19). Further, BANA avers
22 that, contrary to Plaintiff’s assertion in his FAC, BANA was entitled to proceed with its 2016
23 NOD notwithstanding its failure to obtain a certificate of foreclosure pursuant to its 2013 NOD.
24 (*Id.* 3:19–21). The Court will address each of Plaintiff’s claims in turn.
25

1 **A. Specific Performance**

2 In his FAC, Plaintiff requests that the Court order BANA to produce the original or
3 certified copies of the note, promissory note, or the DOT. (FAC ¶ 32). Alternatively, Plaintiff
4 requests that the Court order BANA to extinguish the note and cease foreclosure proceedings in
5 light of the fact that “the Note had been paid in full over 6 years ago.” (*Id.* ¶ 33).

6 “Specific performance is an equitable remedy that is utilized in actions for breach of
7 contract, and cannot be asserted as an independent claim for relief.” *Shum v. American Sterling*
8 *Bank*, No. 2:14-cv-0973-GMN-PAL, 2015 WL 265411, at *2 (D. Nev. Jan. 21, 2015) (citing
9 *Carcione v. Clark*, 618 P.2d 346, 348 (Nev. 1980)). To be entitled to specific performance, a
10 plaintiff must establish a breach of contract by the defendant. *Blanford v. Sun Trust Mortg.,*
11 *Inc.*, No. 2:12-cv-852-JCM-RJJ, 2012 WL 4613023, at *3 (D. Nev. Oct. 1, 2012).

12 Here, Plaintiff does not plead breach of contract in his FAC. (*See generally* FAC).
13 Rather, Plaintiff’s specific performance claim is linked to his allegation that Plaintiff has “paid
14 the entire amount owed for the Note,” and, accordingly, BANA wrongfully moved forward
15 with foreclosure proceedings. (*Id.* ¶¶ 20, 33). Nonetheless, Plaintiff has not come forward with
16 any evidence establishing that he paid the note in full.

17 BANA, however, has presented evidence that Plaintiff breached the terms of the note
18 and DOT by failing to repay the loan, and that BANA is entitled to foreclose in the event of
19 default. Specifically, BANA has submitted a copy of Plaintiff’s payment history for the loan,
20 which shows that Plaintiff stopped making payments on his loan in July of 2010. (Ex. E-1 to
21 MSJ 37–48, ECF No. 57-1). The payment history indicates that Plaintiff has made no
22 payments on the loan since that time, and that the outstanding principal balance is \$273,391.46.
23 (*Id.*). Under the terms of the DOT, BANA was therefore permitted to foreclose on the Property
24 due to Plaintiff’s failure to meet his payment obligations. (Ex. B-1 to MSJ ¶ 22, ECF No. 57-1).

1 Plaintiff's only evidence establishing his allegation that he paid the loan in full is his
2 FAC. According to the FAC, "Plaintiff made all payments due on the mortgage loan, and in
3 fact, had paid the loan in full at an accelerated rate." (FAC ¶ 9). At the summary judgment
4 stage, however, Plaintiff cannot rely solely on unsupported allegations. *See Anderson v. Liberty*
5 *Lobby Inc.*, 477 U.S. 242, 256 (1986) (noting that "the plaintiff must present affirmative
6 evidence in order to defeat a properly supported motion for summary judgment."). In light of
7 BANA's undisputed evidence that Plaintiff breached the terms of the note and DOT, the Court
8 finds that there is no genuine issue of material fact regarding Plaintiff's claim for specific
9 performance. Accordingly, BANA is entitled to summary judgment on this claim.

10 **B. Breach of the Implied Covenant of Good Faith and Fair Dealing**

11 Plaintiff avers that "[BANA] breached the covenant of good faith and fair dealing by
12 failing to comply with the terms of the mediation process with Plaintiff, by engaging in
13 deceptive conduct in order to create a false impression respecting the title to the [Property] and
14 by depriving the Plaintiff of the benefit of his bargain and agreement." (FAC ¶ 51). In
15 response, BANA asserts that "Plaintiff does not identify any actions" that were "unfaithful to
16 the purpose" of the note or the DOT. (MSJ 8:25–9:1).

17 "In Nevada, an implied covenant of good faith and fair dealing exists in every contract."
18 *Armada Concrete, LLC v. Jaynes Corp.*, No. 2:14-cv-02176-GMN-GWF, 2017 WL 3567523,
19 at *7 (D. Nev. Aug. 17, 2017) (citing *Shaw Const., Inc. v. Washoe Cnty.*, 784 P.2d 9, 9 (Nev.
20 1989)). "When one party performs a contract in a manner that is unfaithful to the purpose of the
21 contract and the justified expectations of the other party are thus denied, damages may be
22 awarded against the party who does not act in good faith." *Hilton Hotels Corp. v. Butch Lewis*
23 *Prods., Inc.*, 808 P.2d 919, 923 (Nev. 1991).

24 Here, Plaintiff has failed to present evidence establishing that BANA operated in a
25 manner that is unfaithful to the contract between Plaintiff and BANA. However, BANA, as

1 noted *supra*, has established that it has acted in accordance with the terms of the DOT. (*See* Ex.
2 B-1 to MSJ ¶ 22); (Ex. E-1 to MSJ 37–48).

3 Further, Plaintiff’s allegation that BANA failed to comply with the terms of the
4 mediation process fails as a matter of law. Specifically, BANA was not obligated to produce
5 original loan documents prior to commencing foreclosure proceedings. As this Court has
6 previously noted, “[b]ecause foreclosures in Nevada are non-judicial, parties initiating
7 foreclosure proceedings are not required to prove standing to foreclose in a court of law before
8 initiating the foreclosure process.” *Birkland v. Countrywide Home Loans, Inc.*, No. 2:11-cv-
9 00502-GMN-PAL, 2012 WL 83773, at *4 (D. Nev. Jan. 11, 2012). “To the contrary, the case
10 law within this district holds that the Nevada law governing nonjudicial foreclosure, NRS §
11 107.080, does not require a lender to produce the original note,” prior to initiating foreclosure.
12 *Villa v. Silver State Fin. Servs., Inc.*, No. 2:10-cv-02024-LDG-LRL, 2011 WL 1979868, at *6
13 (D. Nev. May 20, 2011) (quoting *Kwok v. Recontrust Co., N.A.*, No. 2:09-cv-02298-RLH-LRL,
14 2010 WL 4810704, at *4 (D. Nev. Nov. 19, 2010)). Nor does Nevada law require that a lender
15 “prove its status as a real party in interest, holder in due course, current holder of the note,
16 nominee of the current holder of the note, or any other synonymous status as a prerequisite to
17 nonjudicial foreclosure proceedings.” *Id.*; *Kwok*, 2010 WL 4810704, at *4.

18 In addition, BANA’s alleged failure to obtain a certificate of foreclosure pursuant to its
19 2013 NOD does not preclude it from initiating foreclosure proceedings under its 2016 NOD.
20 The Nevada Supreme Court has held that the “[d]enial of [a Foreclosure Mediation Program]
21 certificate does not, without more, permanently preclude foreclosure.” *Holt v. Reg’l Tr. Servs.*
22 *Corp.*, 266 P.3d 602, 605 (Nev. 2011). Moreover, a lender may restart the non-judicial
23 foreclosure process under a new notice of default. *See id.* (“The judicial review proceeding . . .
24 halted the foreclosure sale noticed by the 2009 NOD, but it did not preclude [defendant
25 mortgagees] from restarting the foreclosure process via the 2010 NOD.”). Here, BANA’s

1 failure to secure a certificate of foreclosure under the 2013 NOD did not preclude it from
2 moving forward with the 2016 NOD.

3 Based on the foregoing, the Court finds that BANA's conduct relating to the mediation
4 and BANA's subsequent initiation of foreclosure proceedings are not "unfaithful to the purpose
5 of the contract and the justified expectations" of Plaintiff. *See Hilton Hotels Corp.*, 808 P.2d at
6 923. This is particularly the case in light of BANA's undisputed evidence that Plaintiff
7 breached the contract by defaulting on the loan and that BANA was entitled to foreclose in the
8 event of default. (*See* Ex. B-1 to MSJ ¶ 22); (Ex. E-1 to MSJ 37–48). Accordingly, BANA is
9 entitled to summary judgment on Plaintiff's claim for breach of the implied covenant of good
10 faith and fair dealing.

11 **C. Intentional Infliction of Emotional Distress**

12 Plaintiff seeks relief for intentional infliction of emotional distress because BANA
13 allegedly caused Plaintiff emotional distress by showing an "utter and complete disregard for
14 the peace of mind of the Plaintiff." (FAC ¶¶ 38–41). According to the FAC, Plaintiff alleges
15 his emotional distress arises specifically from BANA's failure to submit the required
16 documentation during mediation and BANA moving forward with foreclosure despite lacking
17 this documentation. (*Id.* ¶¶ 39–40).

18 To establish a claim for intentional infliction of emotional distress, a plaintiff must
19 show: 1) extreme and outrageous conduct by the defendant with either the intention of, or
20 reckless disregard for, causing emotional distress; 2) that, as a result of that conduct, the
21 plaintiff suffered severe or extreme emotional distress; and 3) actual or proximate causation.
22 *Dillard Dep't Stores, Inc. v. Beckwith*, 989 P.2d 882, 886 (Nev. 1999).

23 Here, Plaintiff fails to establish that BANA's conduct in foreclosing on Plaintiff's
24 property was extreme or outrageous. As noted *supra*, Nevada law permits a lender to record a
25 subsequent notice of default and restart the foreclosure process regardless of whether a

1 certificate of foreclosure was issued at a prior foreclosure mediation. *See Holt*, 266 P.3d at 605.
2 Additionally, Nevada law does not require BANA to prove its status as a real party in interest
3 as a prerequisite to initiating foreclosure proceedings. *See Birkland*, 2012 WL 83773, at *4.
4 BANA's activity in this regard does not constitute conduct "outside all possible bounds of
5 decency," or "regarded as utterly intolerable in a civilized community." *Goodwin v. Exec. Tr.*
6 *Servs., LLC*, 680 F. Supp. 2d 1244, 1256 (D. Nev. 2010). As another court in this District
7 recognized, "[l]enders may pursue their own economic interest without being subject to a claim
8 for infliction of emotional distress for exercising their rights under the contract." *Smith v.*
9 *Accredited Home Lenders*, 2:15-cv-01130-KJD-VCF, 2016 WL 1045507, at *3 (D. Nev. March
10 15, 2016). Therefore, the Court grants summary judgment for BANA on Plaintiff's claim for
11 intentional infliction of emotional distress.

12 **D. Quiet Title**

13 Plaintiff seeks quiet title by requesting that this Court declare the uncertified copies of
14 the note, promissory note, or DOT invalid, "therefore conveying total and unencumbered
15 interest in the subject property to the Plaintiff." (FAC ¶ 48). In Nevada, a claim to quiet title
16 "may be brought by any person against another who claims an estate or interest in real property,
17 adverse to the person bringing the action, for the purpose of determining such adverse claim."
18 *Chapman v. Deutsche Bank Nat'l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013). A quiet title
19 claim "does not require any particular elements," but each party must prove his or her claim to
20 the property in question. *Id.*

21 As discussed *supra*, Plaintiff has not established that he is entitled to the Property.
22 BANA has shown that Plaintiff signed the note and DOT, and subsequently failed to make any
23 payments after July 2010. (*See* Ex. A-1 to MSJ 6–7, ECF No. 57-1); (Ex. B-1 to MSJ 23–24,
24 ECF No. 57-1); (Ex. D-1 to MSJ 33–35, ECF No. 57-1). In addition, BANA is allowed to
25 foreclose in the event of nonpayment pursuant to the language of the DOT. (*See* Ex. B-1 to

MSJ ¶ 22, ECF No. 57-1). Accordingly, BANA is entitled to summary judgment on Plaintiff's quiet title claim.

E. Declaratory and Injunctive Relief

Plaintiff asserts causes of action against BANA for declaratory and injunctive relief. (FAC ¶¶ 36–37, 42–45). Specifically, Plaintiff seeks to enjoin BANA from transferring, selling, assigning, or conveying the subject property or the loan that BANA holds on the subject property, and from foreclosing on the property pending the outcome of the instant action. (*Id.* ¶ 37). With regard to declaratory relief, Plaintiff asks this Court to issue a declaration that: 1) “any delinquency in mortgage payments occurred at the direction of [BANA] during the course of the loan modification process, not through any fault of the Plaintiff,”; and 2) “that it orders [BANA] to correct any negative notations on the Plaintiff's credit report which it may have issued” during the loan modification process. (*Id.* ¶ 44).

Both declaratory relief and injunctive relief are remedies rather than stand-alone causes of action. *See Martin v. Bank of America*, No. 2:15-cv-0372-GMN-PAL, 2016 WL 70456, at *3 (D. Nev. Jan. 6, 2016) (“It is well established that injunctive relief and declaratory relief are remedies rather than independent claims for relief.”). Here, the Court has concluded *supra* that BANA is entitled to summary judgment on all of Plaintiff's independent claims for relief. In light of this conclusion, Plaintiff cannot establish that declaratory or injunctive relief is warranted. BANA is, accordingly, entitled to summary judgment on Plaintiff's claims for declaratory relief and injunctive relief.

F. Motion to Expunge Lis Pendens

BANA requests that this court expunge the lis pendens that Plaintiff recorded against the Property on July 26, 2017. (Mot. to Expunge Lis Pendens 10:16–17, ECF No. 58). Local Rule 7-2(d) provides that “[t]he failure of an opposing party to file points and authorities in response to any motion, except a motion under Fed. R. Civ. P. 56 or a motion for attorney's fees,

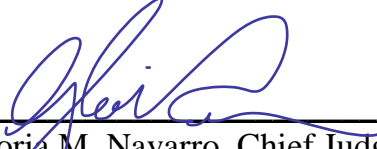
1 constitutes a consent to the granting of the motion.” D. Nev. R. 7-2(d). Given Plaintiff’s failure
2 to file an opposition, the Court grants BANA’s Motion pursuant to Local Rule 7-2(d).

3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that BANA’s Motion for Summary Judgment, (ECF No.
5 57), is **GRANTED**.

6 **IT IS FURTHER ORDERED** that BANA’s Motion to Expunge Lis Pendens, (ECF
7 No. 58), is **GRANTED**.

8 **DATED** this 8 day of March, 2018.

9
10 
11 _____
12 Gloria M. Navarro, Chief Judge
13 United States District Court
14
15
16
17
18
19
20
21
22
23
24
25